Stevenson v Ghosh-Hazra
2021 NY Slip Op 34032(U)
September 28, 2021
Supreme Court, Bronx County
Docket Number: Index No. 20565/2019E
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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AAISHA STEVENSON, as mother and natural guardian of C.J. ,

DECISION and ORDER
Index No. 20565/2019E

Plaintiff,

- against -

KABITA GHOSH-HAZRA, M.D., YUXI CHEN M.D., MICHAEL ATKIN, M.D., SHOBA CHERIAN, M.D., and MONTEFIORE MEDICAL CENTER,

Defendants.
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Doris M. Gonzalez, J.

Defendants Kabita Ghosh-Hazra, M.D., Yuxi Chen M.D., Michael Atkin, M.D., Shoba Cherian, M.D., and Montefiore Medical Center (collectively, "defendants") move for summary judgment dismissing plaintiff's complaint pursuant to CPLR 3212. Plaintiff opposes the motion.

In this medical malpractice action brought on behalf of the infant plaintiff C.J., the plaintiff alleges that the defendants misdiagnosed the infant's condition. In particular, it is alleged that on February 25, 2015, C.J.'s mother brought C.J., then one year old, to the Montefiore Emergency Room, and reported that C.J. was holding his head to the left for two to three months, and that he had eye tearing for about three months. An initial diagnosis of torticollis was made. The infant was repeatedly seen for this condition by the various defendants. Eventually, on December 9, 2015, C.J. underwent an MRI of his brain, which revealed a 12 mm mass involving the posterolateral left medulla and cerebellum, probably involving the left inferior cerebellar peduncle.

C.J. was admitted to Montefiore Medical Center from December 9 to 18, 2015. During this admission, on December 14, 2015, C.J. underwent a craniotomy with resection of the majority of his brain tumor with Dr. Goodrich. Subsequent MRIs of C.J.'s brain revealed growth of the remainder of the tumor. In July 2018, a follow-up MRI revealed further growth. From November

2018 to March 2020, the infant underwent chemotherapy. In September 2020, a brain MRI revealed tumor growth, and he was admitted to Montefiore Medical Center from October 26, 2020 to November 12, 2020, during which he underwent a partial resection of his brain tumor performed by Dr. Ira Abbott.

The complaint as amplified by the bill of particulars alleges, generally, that the defendants failed to timely diagnosed C.J.'s pilocytic astrocytoma; misdiagnosed C.J. with torticollis; failed to consider a brain tumor as part of the differential diagnosis; failed to timely order and perform radiologic studies of C.J.'s neck, inclusive of x-rays, CT scan(s) or MRI(s); failed to take a proper history; failed to perform a proper physical exam of C.J.'s head or neck; and failed to refer C.J. to a Neurologist or Neurosurgeon immediately upon a finding or documenting C.J.'s head tilt or torticollis. Plaintiff alleges that had C.J.'s pilocytic astrocytoma been diagnosed, the infant would have experienced a better outcome, inclusive of a complete resection, and would have avoided chemotherapy and related pain and suffering and other damages.

In moving for summary judgment, defendants rely on the affidavit of Jeffrey H. Wisoff, M.D., board-certified as a pediatric neurosurgeon, and the affirmation of Susan N. Chi, M.D., board certified as a pediatric oncologist. Dr. Wisoff states that that he would have received the same treatment had the tumor been diagnosed in February 2015. Specifically, it is my opinion within a reasonable degree of medical certainty that C.J.'s tumor would not have been completely resectable had it been diagnosed in February 2015 as it originated in the left cerebellar inferior peduncle, a portion of the brainstem, and was infiltrative in nature. These experts opine that the defendants did not depart from the accepted standards of medical care in their treatment of the plaintiff. He states, "The biology of these tumors does not have an inherent or true border, which means that even when a gross-total resection is achieved remnants of tumor or even microscopic disease are left behind."

Dr. Chi similarly states that within a reasonable degree of medical certainty that the alleged delay in diagnosing C..I.'s WHO grade 1 pilocytic astrocytoma (brain tumor) did not affect his ultimate treatment course or prognosis. She postulates that given the location of the tumor, a complete resection would not have been feasible even if the tumor had been identified in February 2015. She states that his clinical presentation highlights the slow growing nature of his pilocytic astrocytoma, and demonstrates that there was likely no significant tumor growth during the aforementioned eight month period, as tumor growth would have resulted in further physical manifestation, such as facial weakness and asymmetry as well as issues with weakness, balance, and coordination.

In opposition, plaintiff submits the expert report of Dr. Stephen M. Bloomfield, a neurosurgeon. Dr. Bloomfield states in substance that based on estimates of the growth of the tumor, if the tumor grew to 12 mm in 31 or .387 mm per month, diagnosis and treatment eight months earlier would have been when the tumor was 3 mm smaller, a 25% reduction in size. If the tumor grew to 12 mm in 11 men s, or .916 mm per month, diagnosis and treatment eight months earlier would have been when the tumor was 7.32 mm smaller, a 61% reduction in size. In his 3-page affirmation, he states, after opining as to the tumor's growth, and after noting that the legion abutted but did not invade the cervicomedullary junction, that:

> "It is my opinion to a reasonable degree of medical certainty that because of the delay in diagnosis and treatment this child suffered the loss of a substantial probability to have a complete resection of his tumor, which would have been curative. The records establish that this did not occur, that the tumor has grown back, and that significant further injury has occurred."

In reply, the defendants assert that Dr. Bloomfield affirmed that he specializes in Neurosurgery, not Pediatric Neurosurgery, and failed to demonstrate that he has any relevant

experience treating patients similarly situated to the infant-plaintiff, i.e., a pediatric patient diagnosed with a grade 1 pilocytic astrocytoma.

Analysis

"A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries." (*Anyie B. v Bronx Lebanon Hosp.*, 128 A.D.3d 1, 3, 5 N.Y.S.3d 92, 93, [1st Dept. 2015] [citation omitted]). If a defendant in a medical malpractice action establishes prima facie entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's prima facie showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged." (*Pullman v. Silverman*, 125 A.D.3d 562, 562, 5 N.Y.S.3d 38 [1st Dept. 2015], aff'd 28 N.Y.3d 1060, 66 N.E.3d 663, 43 N.Y.S.3d 793 [2016]; s*ee Scalisi v. Oberlander,* 96 A.D.3d 106, 120, 943 N.Y.S.2d 23 [1st Dept. 2012].)

The defendants has made a prima facie showing of entitlement to judgment as a matter of law by submitting medical records, deposition testimony, and the affidavits of of two experts demonstrating that the defendants did not did not proximately cause the plaintiff's alleged injuries. (*See e.g. Kristal R. v. Nichter*, 115 AD3d 409, 411, 981 N.Y.S.2d 399 [1st Dept. 2014]).

The burden thus shifts to the plaintiff to demonstrate otherwise. A plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 A.D.3d 303, 307, 833 N.Y.S.2d 89 [1st Dept. 2007]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand

summary judgment" (*Diaz v New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 A.D.3d 439, 886 N.Y.S.2d 883 [1st Dept. 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v Long*, 95 A.D.3d 726, 728-729, 945 N.Y.S.2d 246 [1st Dept. 2012]).

Contrary to defendants' argument, the lack of expertise of the plaintiff's neurosurgeon with respect to pediatric cases does not invalidate his opinion. "Any lack of skill or expertise" that the plaintiff's expert may have had "goes to the weight of his … opinion as evidence, not its admissibility" (*Erbstein v Savasatit*, 274 A.D.2d 445, 445, 711 N.Y.S.2d 458 [2000]).

On the other hand, as the defendants correctly argue, the affirmation of Dr. Bloomfield is entirely conclusory. Dr. Bloomfield fails to rebut any of the detailed showings made by the defendants'' experts. Plaintiff's expert failed to address, much less refute, Dr. Wisoff's and Dr. Chi's opinions that:

(1) The infant-plaintiff's brain tumor originated in the left cerebellar inferior peduncle, a portion of the brainstem, and was infiltrative in nature;

(2) A gross-total or "complete" resection would only be possible if the tumor had distinct margins that were not present in this case given the infiltrative nature of the tumor both on MRI and intra-operative observation;

(3) A grade 1 pilocytic astrocytoma, like the infant-plaintiff's, is by definition an infiltrating tumor, meaning that it is inherently not "fully resectable" in the traditional sense and does not have well defined or distinct margins;

(4) The infant-plaintiff's tumor was infiltrative at the time of diagnosis as noted in the December 14, 2015 operative report and would also have been infiltrative had the tumor been diagnosed in February 2015; and/or

(5) The infant-plaintiff's tumor was only 12 mm at the time of diagnosis, and had the tumor been diagnosed earlier and it was in fact smaller at that earlier time that it would not have been immediately resected and rather would have been monitored with a repeat MRI in approximately three months.

The First Department recently had occasion to address the sufficiency of a plaintiff's expert's showing in directing that summary judgment be granted to the moving defendants. In that case, the Court found as follows:

> "In any event, plaintiff's expert failed to raise a triable issue of fact in opposition to Bronx Lebanon's prima facie showing. The expert failed to address the opinions and conclusions of Bronx Lebanon's expert regarding plaintiff's clinical presentation upon arrival at the hospital on February 4, 2015, at which time fetal monitoring, a sonogram, and a pelvic examination all indicated no fetal distress and that plaintiff was not in labor (see Rotante v New York Presbyt. Hosp.-N.Y. Weill Cornell Med. Ctr., 175 AD3d 1142, 1143, 107 N.Y.S.3d 289 [1st Dept 2019]). Furthermore, the opinion of plaintiff's expert that, had plaintiff been admitted, monitored, and administered certain medications to accelerate fetal brain and lung growth, the fetus would not have died in utero was conclusory. Specifically, the expert failed to provide the "requisite nexus between the malpractice allegedly committed and the harm suffered," which was necessary in view of the medical evidence that a bacteria infection was the cause of the intrauterine fetal death (Foster-Sturrup v Long, 95 AD3d 726, 727-28, 945 N.Y.S.2d 246 [1st Dept 2012] [internal quotation marks omitted])." (*Ruiz v Reiss*, 180 A.D.3d 623, 623-624, 121 N.Y.S.3d 16, 17 [1st Dept. 2020].)

Here, similarly, the entirely conclusory, even cursory showing of the defendant's expert fails to raise any issue of fact.

Accordingly, it is

ORDERED that the motion is granted, and it is

ORDERED that the complaint is dismissed.

This is the Decision and Order of the Court.

Dated: 9-28-2021

Doris M. Gonzalez, J.S.C.